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T. 340. 113

Office Supreme Court U. S.
FILED
OCT 17 1898
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Filed Oct. 17, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN,

Petitioners,

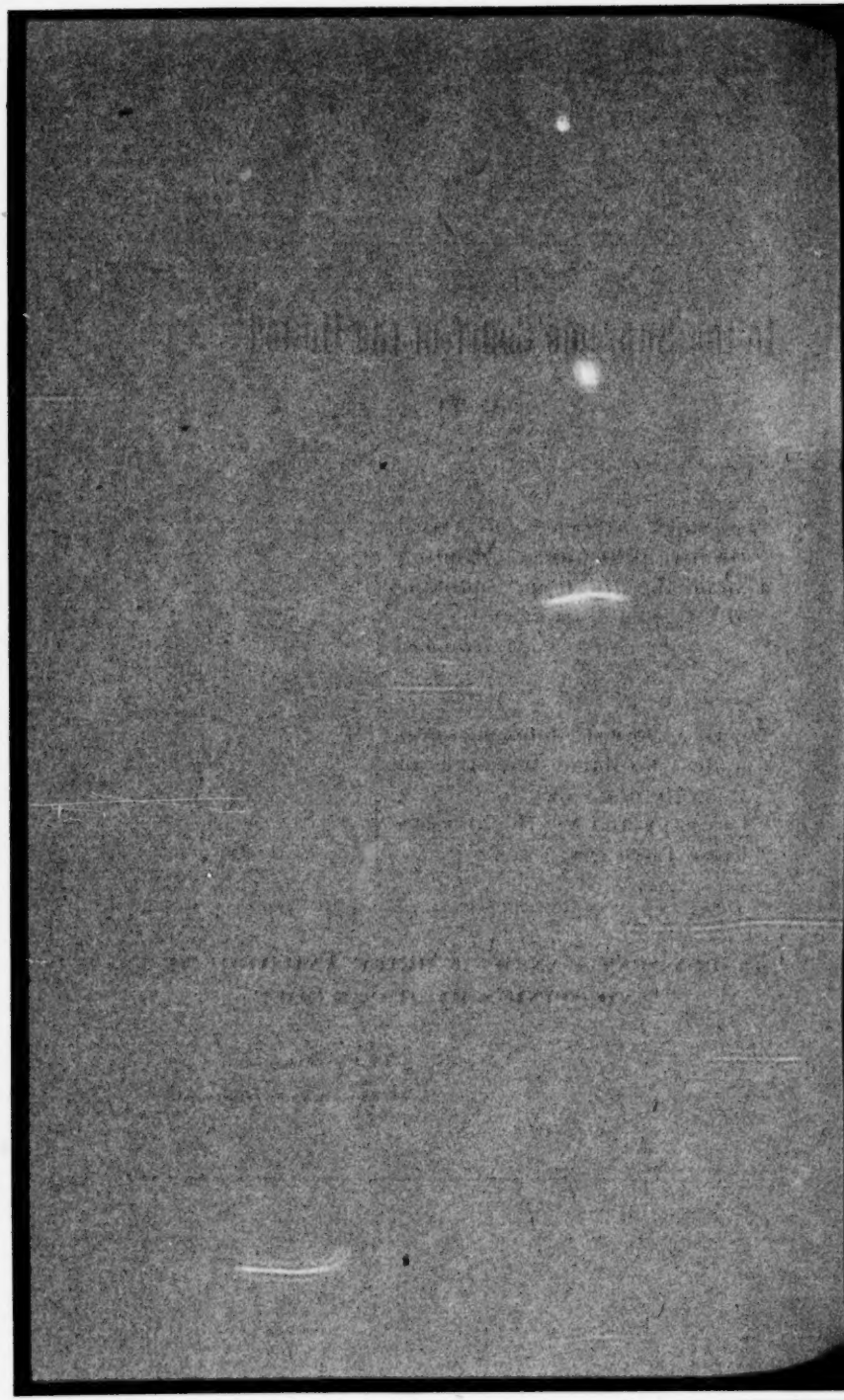
vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY.

No. 370.

RESPONDENT'S ANSWER, BRIEF AND ARGUMENT AND OPINION BY JUDGE GOFF.

A. G. SAFFORD,
Attorney for Respondent.



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RESPONDENT'S ANSWER.

And now comes W. H. Coffman, the above-named respondent, and for answer to the petition for a writ of certiorari, or unto so much thereof as he is advised is material for him to make answer unto, answering, says:

I. That he admits the truth of the first paragraph of the petition.

II. That he denies the allegation in the second paragraph, and while it is true that it was stated in the original bill filed in the United States Circuit Court for the Fourth Circuit, that the supposed damage "is largely in excess of the sum of $10,000," it appears from the whole record that no evidence

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was introduced whatever touching this subject, excepting a pretended assignment from the Southwest Virginia Improvement Company, under date of April 1, 1895, which purported to convey to the petitioners the entire and exclusive right to use the word "Pocahontas" as a trade-name or mark for coal, for the consideration of $5.00, only.

III. As to the third paragraph, the respondent admits that the suit was brought to restrain him from using the word "Pocahontas," as applied to coal, but the respondent denies that the petitioners had a trade-mark in that name, as will at large and more fully appear hereafter.

IV. As to the allegations in the fourth paragraph, this respondent denies that the petitioners ever had title to the word "Pocahontas" as a trade-mark; and, while it does appear that a pretended assignment was made by the Southwest Virginia Improvement Company to the petitioners, pretending to give to them the right to use that name, under date of April 1, 1895, as set forth above, the petitioners could not derive title from the Southwest Virginia Improvement Company because, as appears hereafter, that Company had no right to appropriate "Pocahontas," a geographical name, as a commercial trade-mark; and the case shows no pretense on the part of that Company to claim that name until April 1, 1895, and there is no evidence whatever that the Southwest Company had applied that name to the product of its mines prior to that date, and, from the very inception of its business, had permitted the petitioners to sell by that designation, not only the product of its mine but that of other coal mines in the Pocahontas field, and even if the Southwest Virginia Improvement Company had, originally, any right to the name, they had abandoned the same by permitting, for a long series of years, all the other operators in the field to apply it to their products in the markets, and the record shows that the petitioners, under one business designation or another, had largely controlled the output of the mines, not only of the Southwest Virginia Improvement Company, but also of twenty-five or thirty other mines in the field, there having been a successful combination by the Norfolk & Western R. R. Co.

and the petitioners, by which they were enabled to handle the entire output of that region from July, 1883, until about November 1, 1896, when the respondent became the agent and factor for the Indian Ridge Mines; therefore, the respondent says that whatever right the Southwest Virginia Improvement Company may have had to that name had been abandoned by long-continued acquiescence in the use of that name as designating other property than its own.

V. In answer to the fifth paragraph the respondent says that it is true that in 1881 that portion of Tazewell County, Virginia, in which the town of Pocahontas is situated had no distinct geographical name, but it was not an unexplored wilderness, as appears from the affidavit of Captain Welch, who explored that region of the county, and found and examined the immense coal deposits, and who made at that time a report thereon to the parties employing him; and that June 30, 1882, the United States Government established a post office there and gave it the name of "Pocahontas," a name which had theretofore been given to the settlement by the proprietors of the land in that vicinity; for proof of the incorrect statement in this paragraph, that the South West Company adopted the name, or symbol, of "Pocahontas" as a trade-mark during the year 1882, reference is made by the petitioner to the affidavit of Samuel Castner, Jr., upon page 15; it is to be borne in mind that this affidavit of Castner was filed in the cause at the same time with the bill of complaint for the purpose of obtaining a preliminary injunction, and can in no sense be considered as evidence. Castner, as appears from other parts of the record, had only hearsay evidence of what took place prior to 1883; besides, he is impeached by his subsequent testimony, and the sworn statement made by him in his application to register the word "Pocahontas" as a trade-mark in August, 1885; as pointed out by Judge Goff in his opinion, the name "Pocahontas" was given to the post office established by the Government a year prior to the shipment of any coal to the markets from that field, the first shipment having been made in July, 1883 (78, 159, 160, page 1, Industrial Edition of Bluefield *Daily*

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Telegraph), the post office having been established in June, 1882. The town of "Pocahontas" was incorporated by a special act of the legislature January 31, 1884, two years and more after the establishment of the post office by that name. At the very beginning of the opening of the field and the shipment of coal to the public market, Castner & Co., Limited, a corporation organized under the laws of the State of Pennsylvania, and the predecessor of the petitioners, were the agents of the Southwest Company, and that corporation applied for registration of the word "Pocahontas" as a trademark August 25, 1885, which was claimed to have been used continually by said corporation since January 1, 1885; and the case shows that not only had the Government post office been established and town of "Pocahontas" chartered by the State of Virginia, but also that the product was not shipped to and did not become known in the markets as "Pocahontas" coal until July, 1883, and after, a year after, the post office had been established at that point. The statement that as early as 1882 the Southwest Company had adopted the name of "Pocahontas" as a trade-mark is entirely without foundation, as it appears never to have been claimed by them prior to April 1, 1895, and that Castner & Co., Limited, claimed that they used it continually after January first, 1885, as applied not only to the coal of the Southwest Company, but also to all, without exception, of the working mines in that field from January 1, 1885, to the first of November, 1896. The statement by the interested witness, Kimball, that coal was not known to exist in any quantity prior to the opening of the mines by the Southwest Company, is distinctly disapproved by the testimony of Captain Welch (159). The testimony shows, as a whole, that the Southwest Company never applied the word "Pocahontas" as a designation for coal until long after that word was used as descriptive of that particular locality and was the name of the post office; that the name was given to this deposit because it was first opened in the settlement which was known as "Pocahontas;" in fact it appears, beyond a peradventure, that the geographical locality gave the name to the coal and not, as the petitioners con-

tend, that their trade-mark gave the name to the locality. This appears as well from the references to the record above cited and from the geological atlas of the United States ("Pocahontas folio, Virginia-West Virginia, prepared by the United States Geological Survey, Department of the Interior, under the direction of Charles G. Walcott"), herewith submitted. The coal deposit of this entire region is of a remarkably uniform character. See report of analysis of all the mines (122, 123, 124, 151, 152, 153).

VI. In answer to the sixth paragraph, the respondent denies that the record shows that the Southwest Company adopted the word "Pocahontas" as a trade-mark, nor is it true that Castner & Co., Limited, predecessors of the petitioners, applied the name of "Pocahontas" only to inspected and selected coal; the facts in regard to this matter of selection and inspection of the coal with relation to the name "Pocahontas" are, as stated by Judge Goff in his opinion, that the word has acquired a generic meaning, and it is clear that in the business world it is used to indicate the place where the coal is produced, and it does not point to either the producer or the vender of the same. And the petitioners did not commence to inspect their coal prior to 1894 (132–158–161), and petitioners and their predecessor, Castner & Co., Limited, were not the sole agents for the sale of the coal produced by the Southwest Virginia Improvement Company. By reference to the Coal Producers' Contract (19–26), it will be seen that the Southwest Virginia Improvement Company, and other operators, consigned all of their product to a general coal agent appointed by the Norfolk & Western R. R., and that Castner & Co., Limited, were simply appointed as general tidewater agents, and only handled so much of the product as went to tidewater for shipment; the remainder of the product, that part of it otherwise sold, was sold directly to the consumers by the general coal agents as Pocahontas coal, and did not pass through the hands of the petitioners or their corporate predecessors (132). The object of said "Coal Producers' Contract" was to effect a close combination of all the producers of coal whose output and prices should be placed

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under the exclusive domination of the railroad company, and the petitioners were mere agents for the disposition in the market of the coal which was well known, both that which the petitioners handled and that which they did not handle, as "Pocahontas" coal.

VII. As to the seventh paragraph of the petition, the respondent denies that it (the coal) is known as "Pocahontas" coal by the reason of any inspection given to it by the petitioners; the name is traceable distinctly to the geographical locality in which the deposit is found, and does not mean in the market that it has been inspected or otherwise beneficially manipulated; it appears that all of the coal shipped out of that region is inspected, the petitioners' inspection commenced in 1894, doing this while the coal is being loaded from the tipple into the car, when the impurities which are not thrown out by the miner while blowing down the coal, are removed; the name "Pocahontas" had been applied to the product of this coal field for twelve years before the petitioners commenced the inspection of coal, to which they now claim the word applies. This is evidently an afterthought, as will be seen from an inspection of the bill of complaint, their right being based, as is stated in the second paragraph, upon the claimed fact that in 1882 the Southwest Virginia Improvement Company began selling the coal from their mine as "Pocahontas" coal, and because that company then adopted the trade-mark "Pocahontas" as designating its output. At the beginning, and up to 1894, the output was shipped by petitioners as "Pocahontas" coal without having been inspected, as now claimed, so that the name, as a trade-mark, more properly applies to uninspected than to inspected coal.

And by way of further answer to the fourth, fifth and sixth paragraphs of the petition and in conformation of the allegation of the respondent, attention is called to the opinion of Judge Goff, as follows:

> "It is clear from the evidence that Pocahontas is a word of well known geographical signification, denoting that large and valuable section of the Virginias, famed

the world over for the remarkably valuable and useful coal and coke that it produces. Prior to 1882 this region was comparatively unknown, and entirely in the primeval state in which nature had left it, constituting a part of the Great Flat Top Mountain portion of southwest Virginia and southeast West Virginia. In the years immediately preceding 1882 this wilderness had been sought out and explored by those who represented the capital and energy by which it was afterwards developed. The experts sent into its theretofore hidden recesses returned with the report of its fabulous wealth and wonderful possibilities. The result was the extension of the Norfolk & Western Railroad into and through the Great Flat Top region, and the organization of the Southwest Virginia Improvement Company, under whose auspices the mines were opened and coal was first shipped. The development inaugurated by this company was commenced during the fall of 1881, continued in the year 1882, and the railroad was completed to the mines in the springtime of the year 1883. **The town located at the point where the first mine was opened was early in the year 1882 named Pocahontas, and the post office which was established by the Department at Washington on the 30th day of June, 1882, was likewise then called by the same name. The first coal shipped to the tidewater markets left the mines in July, 1883, and it was billed and sold as 'Pocahontas Coal.'**

"The entire field is now known as the 'Pocahontas' and the 'Pocahontas Flat Top Coal Field.' It embraces large portions of Tazewell and Wise counties in the State of Virginia, and of Mercer, McDowell, Wyoming and Raleigh counties in the State of West Virginia. It is divided into three sections, or working divisions: the Pocahontas, which includes all the mines around the town of Pocahontas; the Bluestone District, embracing the improvments on the Bluestone River; and the Elkhorn, the country in McDowell County on the Flat Top Mountain. **The coal shipped from all this section is known in the markets of the world as 'Pocahontas coal,' evidently so called from the town of that name in which the first mine was located, and from which the first shipments were made.** The coal beds are above the water level and range from five to thirteen feet in thick-

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ness, extending through an area of about five hundred square miles, or three hundred and twenty thousand square acres. An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near two hundred and thirteen thousand square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say two billion one hundred and thirty million tons. At the time when this suit was instituted, thirty-eight different coal and coke companies were operating in the field, all of them advertising, mining and selling the coal excavated from the Pocahontas vein, and known as the 'Pocahontas Flat Top Coal.' For the manufacture of coke over five thousand ovens had been constructed and were in use. During the year 1883 ninety-nine thousand eight hundred and seventy-one tons were mined, the output in the following years rapidly increasing until, in 1894, three million eight hundred and eighty-eight thousand and fifty-eight tons were sent to market.

"*There is no evidence to sustain the allegation in the bill that the Southwest Virginia Improvement Company began selling coal in the year 1882 from the Pocahontas mine, nor that it made any sales of 'Pocahontas coal' in the year 1883, in the sense that those words are used in as a trade-symbol. Nor is there any satisfactory evidence tending to show that said company adopted and used a trade-mark, or made any effort to establish one, as such, prior to the year 1885. It is true that in the assignment made by the Southwest Virginia Improvement Company to the complainants, it is recited that said company 'did adopt on or about the first day of July, 1882, as a trade-mark the word-symbol "Pocahontas,"' but surely that statement in such a paper, made under the date of April 1, 1895, cannot be considered as proving that fact, and the record has been searched in vain for the testimony establishing it.*

"*The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the post office of the same name had been in existence for a year at least.* The claim of complainants, that the town had no existence until January 31, 1884, the date of the act of the Virginia Legislature incorporating it, and that, therefore, it was not known legally, in a geographical sense, prior to such date, is not, in the light of the testimony and in connection with the important questions herein involved, entitled to the consideration given it by

counsel. *There can be no doubt but that at the time the first shipment of coal was made by the Southwest Virginia Improvement Company the town of Pocahontas was in existence, the post office had been established, and that the coal itself was sent from the station of that name. The word 'Pocahontas' then denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was shipped, and it also indicated in business matters, the natural product of all that region.* It follows, therefore, that it could not then be used as an exclusive trade-mark, and as a matter of fact it was not so employed until some time thereafter. *We are impelled to find from the testimony that in the early shipments of coal the word Pocahontas was used, not as a word symbol or trade mark, but simply as the name of the town from whence it came, for the purpose only of pointing out the place of production.* The coal had not then been used and it had not produced the wonderful results that it subsequently did; its reputation had not been made and it had not at that time found its way to the marts of the world, to the furnaces of land and sea. The operators of that section and their vendees, including complainants' predecessors, had not then been given the opportunity to inspect, grade and purify it so as to make it typify the high degree of excellence that it now enjoys, and there is no evidence tending to show that selection and inspection were then resorted to other than is usual in all mines. The first direct evidence bearing on the trade-mark is the application of August 25, 1885, made by Castner & Company (Limited), to register the word 'Pocahontas' at the United States Patent Office. Such *registered trade-mark is not now relied upon by complainants, why we have not been advised, but likely for reasons connected with the decision of the Supreme Court in the Trade-Mark Cases*, 100 U. S., 82. It is, however, worthy of notice that such application was made under the provisions of Sec. 4937, Rev. Stat. of the United States, which require the party so applying to set forth in the statement made by him the length of time, if any, during which the trade-mark had been in use, and that said applicants in their statement so filed used this language: 'This trade-mark has been used continuously by said corporation since about January 1, 1885.' The word-symbol, or device now claimed by complainants, as a trade-mark, is founded on the rule of the common law, that the person or company first employing it to distinguish the goods made or sold by the owner thereof, is entitled to

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the benefits arising from its exclusive use. The chancery courts of England and of this country have long recognized this privilege, and have enforced it, if the property right of the claimant thereto has been duly established.

"As we see this case, the complainants are not entitled to the *exclusive* right to use the word 'Pocahontas,' as descriptive of either the locality or character of the coal mined in the 'Pocahontas coal field,' but all of the producers of that product in that section have the right to so use it in common with complainants. *That word has acquired a generic meaning, and from the evidence before us it is clear that, in the business world, it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vendor of the same.* All the mine owners who by their labor succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth; and surely it cannot be that any one of them can inhibit all the rest from exercising the privilege, which was the birth-right of the section, and is an advantage common to all who are interested in it. *To give to complainants below the exclusive right they claim in their bill would be to ignore the principle that is the foundation of the protection given to trade-symbols and marks.*"

VIII. As to the eighth paragraph, the respondent asserts that the regulation of the petitioners of 1894, in regard to inspection and grading of their coal, has not increased the volume of sales, and has no knowledge as to the expenditures claimed to have been made by them in the development of their business.

IX. As to the ninth paragraph, the respondent denies that the public and dealers in coal have uniformly acquiesced in the pretended right of the petitioners and their corporate predecessor to the exclusive use of the word "Pocahontas" (95, 103, 104, 105, 142, 144, 164, 170, 171). The corporation known as the "Pocahontas Company" (145) was chartered by the State of West Virginia, March 8, 1895, for the purpose of mining coal, manufacturing coke, buying, selling and generally dealing in coal and coke, and it is shown (p. 17,

Daily Telegraph) that this "Pocahontas Company" in 1896, handled the coal output of thirty-two operations, and the coke output of twenty-seven operations, which was about seventy per cent of the total product of the Pocahontas field; the other thirty per cent being also disposed of in the market as "Pocahontas" coal; and prior to that time the operators in the field disposed of all their coal through the general coal agent, who consigned as much as went to tidewater to the petitioners, and such of it as was not consigned to the petitioners was disposed of directly to the trade by the general coal agent (27–30) as Pocahontas coal. The Pocahontas Coal Company (the Norfolk & Western Railway Company in disguise) from its organization, and not earlier than 1884, until the advent of the respondent as an agent and factor for the Indian Ridge and Browning mines, handled substantially all the coal produced; it is therefore apparent there were others besides the petitioners or their corporate predecessor, who sold in the market the product of this field as "Pocahontas" coal, coal with which the petitioners had nothing whatever to do. The combination between the Railroad Company and petitioners has been such as to make it almost impossible for new and independent operations to exist; no new operation being permitted until the owner signed the scandalous "Coal Producers' Contract" binding himself to dispose of all of the output through the general coal agent by the Railroad Company.

X. As to the tenth paragraph.

(*a*) The respondent denies that he offered for sale inferior coal at reduced prices under the name of "Pocahontas" coal, and avers that the coal offered for sale by him was of the same, or superior, quality as that sold by petitioners, and that he has obtained the highest market price for the same. That prior to the first day of November, 1896, the petitioners handled the output of the Indian Ridge mines directly, and disposed of all of the output of these mines under the name of "Pocahontas" coal. During the time that the respondent has handled the output of this mine it has been subject to the same class of inspection, and has been marketed by the respondent

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as "Pocahontas" coal, except during the time the respondent was improperly enjoined from using the name "Pocahontas." That before the respondent marketed the output of the Browning mine the petitioners had marketed that output as "Pocahontas" coal, and the petitioners have since succeeded in getting away from the respondent the business of marketing the output of the Browning mine, and have made many unsuccessful efforts to regain for themselves the agency for the Indian Ridge mine.

(*b*) The respondent alleges that he has not practiced any deception upon the public or perpetrated any fraud upon the petitioners, or has advertised to sell the coal obtained from the Browning and Indian Ridge mines, and the Pocahontas Flat Top region, as having been purchased from the petitioners, or as mined by them. He has represented it as coal from the Pocahontas field, and it was in fact such coal; he has made no false representation, and has invaded no right to which the petitioners can properly assert a claim. As stated in the opinion of Judge Goff, the allegation that the respondent has been engaged in unfair or fraudulent trade is not supported by the evidence, and the representations made by him were neither fraudulent nor untrue; it nowhere appears that he ever represented to the public that he was selling the same article sold by the petitioners, except as their coal was comprehended by the word "Pocahontas," which also justly describes his own.

(*c*) The respondent denies that he ever sold any coal as "Pocahontas" coal without its being first prepared, selected and graded and properly inspected.

(*d*) Respondent denies that he ever deceived, or attempted to deceive, any persons of the trade, or gave any one any cause to believe that he was selling the petitioners' coal, and even if the respondent had done so, that question is entirely independent of the question of trade-mark, and of the petitioners' right to the exclusive use of the word "Pocahontas."

The finding of the Circuit Court of Appeals is explicit upon this point, and is as follows:

"This allegation that the **defendant has been engaged in unfair and fraudulent trade is not supported by the evidence.** It has been shown that he was advertising and selling 'Pocahontas coal,' but the testimony also shows that the coal he so advertised and sold was in fact from the 'Pocahontas coal field.' It follows that the representations made by him were neither fraudulent nor untrue, and that he had a lawful right to so advertise and sell. It nowhere appears that he ever represented to the public that he was selling the same article sold by complainants, except as their coal was comprehended by the word Pocahontas, which also justly described his own. He sold the product of the Browning mine, which is located adjoining the original mine of the Southwest Virginia Improvement Company, in the town of Pocahontas, the coal from which is now disposed of by the complainants as 'Pocahontas coal,' and it is proven that both collieries excavate from the same vein. As to the right of the Browning mine, one of the oldest in the field, to sell its product as 'Pocahontas coal' there can be no doubt, and it would be unconscionable to deny it. He also sold from the Indian Ridge mine, which is located within the 'Pocahontas coal field,' and it is shown that the complainants are now selling the output of the Rolfe and Arlington mines as 'Pocahontas coal,' both of which adjoin the Indian Ridge mine. The complainants themselves formerly sold the coal from this mine as 'Pocahontas coal,' and it is really difficult to understand why it becomes another article in the hands of the defendant. It is also set forth in the bill that the coal from the Indian Ridge section does not grade as high as that from other portions of the field, and that it had not been carefully inspected by the defendant before it was sold. But the evidence does not sustain the claim, and it appears that the complainants themselves have endeavored to again secure the right to sell this coal as 'Pocahontas coal,' since it has been so sold by the defendant, and we cannot believe that they would have made this effort had the grade of the product been inferior, or its inspection careless.

"The proof does not show that the appellant has practiced any deception upon the public, or that he has perpetrated any fraud upon the appellees. The appellant advertised and was selling coal obtained from the Browning and Indian Ridge mines, of the 'Pocahontas Flat Top Region,' and he did not represent it as purchased from the appellees, nor as mined by them. He has rep-

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resented it as coal from the Pocahontas field, and it was in fact such coal. He has made no false representations, and he has invaded no right to which the appellees can properly assert a claim."

XI. The respondent admits the allegation in the eleventh paragraph.

XII. The respondent admits the allegations in the twelfth paragraph.

XIII. As to the thirteenth paragraph, the respondent admits that the petitioners filed their bill in equity in the Circuit Court in the District of Massachusetts against W. C. Atwater & Co., of Fall River, Mass., but for greater certainty as to the allegations contained in that bill of complaint, and as to the proceedings in the Circuit Court of Massachusetts and the Circuit Court of Appeals for the First Circuit, the respondent says that the best evidence of what took place in those courts is a duly certified copy of the proceedings therein; and the respondent ought not be required to make further answer, but he is informed that a preliminary injunction was applied for by the petitioners, and secured against said Atwater & Co., enjoining them from applying the term "Pocahontas" to coal sold by them.

XIV. As to the fourteenth paragraph, the respondent still insisting that the petitioners should have produced a duly certified copy of the proceedings, states that Atwater & Co. appealed from the decision of Judge Colt allowing the preliminary injunction to the Circuit Court of Appeals for the First Circuit; and while this respondent has no direct personal interest in that suit, there has been sent to him, among other documents, a brief of petitioners' counsel, from which it appears that upon the hearing for preliminary injunction the whole question was not discussed, as appears from the following clause, quoted verbatim from the brief of the petitioners' counsel in the Circuit Court of Appeals:

"Such being the facts in the case, his honor, Judge Colt, upon the argument below, restricted the discussion to two points, viz: first, the relationship existing between Coffman and Atwater & Co.; and second, whether or not

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the coal sold to Atwater & Co. was exempt from the operation of the injunction order in the Coffman suit. In thus restricting the discussion, it was evident that Judge Colt was of the opinion that the decree of the West Virginia Court was prima facie evidence of the appellees' right to the trade mark and that that was sufficiently established for the purpose of the motion for preliminary injunction. On the merits the present case has been tried only before the West Virginia Court, and its decision was followed by Judge Colt after he had ascertained that Atwater & Co. were practically the agents of Coffman."

Respondent admits that on June 3, 1898, the Circuit Court of Appeals for the First Circuit rendered the opinion which is attached to the petition, but denies that that decision was based upon substantially the same state of facts as existed in the case finally decided in the Circuit Court of Appeals for the Fourth Circuit. In the Massachusetts case there was a motion for a preliminary injunction in which it was claimed that Atwater & Co. ought to be enjoined because this respondent was under injunction in the case pending in the Circuit Court at the time the coal was shipped to Atwater & Co., and upon the ground of privity between the respondent under injunction and Atwater & Co.; and it was the question of privity which was submitted to the court in the first instance, and upon which the preliminary injunction was granted, and the question which was reviewed and passed upon by the Circuit Court of Appeals was whether the preliminary injunction at the time it was allowed was a proper order. And it does not appear, and would not appear if the case was properly certified to this court, that the decision of the Circuit Court of Appeals was upon substantially the same state of facts as the case in the Fourth Circuit.

XV. As to the fifteenth paragraph, the respondent insists that the final disposition of the case, as announced by the Circuit Court of Appeals for the Fourth Circuit, having before it all the facts and testimony taken in that case, and the decision of the Circuit Court of Appeals for the First Circuit upon the question of preliminary injunction merely, with no

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evidence before it except the ex parte affidavits filed in support of and against the granting of that interlocutory order, is not such a divergence of opinion as to warrant this court in its discretion to bring the otherwise final decision of the Circuit Court of Appeals in the Fourth Circuit before it for review.

XVI. And as to the allegations in the sixteenth paragraph, the respondent admits that after the opinion of the Circuit Court of Appeals for the Fourth Circuit had been rendered, the petitioners asked for a rehearing, which said petition was denied on May 19, 1898.

XVII. And as to the allegations in the seventeenth paragraph, the respondent asserts that there was no error in the action of the Circuit Court of Appeals for the Fourth Circuit in this reversion of the decision of the Circuit Court for the District of West Virginia, and in remanding the cause with instruction to dismiss the bill. Nor was there error in the action of the Circuit Court of Appeals in denying the petition for a rehearing.

XVIII. And as to the eighteenth paragraph, the respondent insists that the decision of the case in the First Circuit cannot be brought before this court for review, because the act of Congress creating the Circuit Court of Appeals and providing that in certain cases the decrees of those courts might be reviewed in this court, applies specifically to final decrees only, and that a mere interlocutory decree cannot be reviewed in this court.

Respondent having fully answered, prays that the petition for certiorari may be denied, and for his costs in this behalf most unjustly sustained.

W. H. COFFMAN.

A. G. SAFFORD,
Attorney.

States of America } At Washington
District of Columbia } ss. In said District on this
17th day of October 1898, then personally appeared
W. H. Coffman and made oath that the foregoing
answer by him subscribed contains the truth
according to the best of his knowledge information
and belief. Before me
J. Y. Knight
Notary Public

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RESPONDENT'S BRIEF AND ARGUMENT.

The court should not entertain the motion of the petitioners for a writ of certiorari, because:

1. It is not shown that "the circumstances imperatively demand that form of interposition."

2. It is not shown that the question is of financial importance.

3. The petitioners have not certified to this court the proceedings in the Massachusets case.

4. The questions decided by the Circuit Court of Appeals for the First Circuit and the Circuit Court of Appeals for the Fourth Circuit were not the same.

5. The decision in the First Circuit was obtained upon *ex parte* affidavits merely, evidently so as to mislead that court in material matters.

6. The petitioners' case is without merit.

I.

IT IS NOT SHOWN THAT THE CIRCUMSTANCES IMPERATIVELY DEMAND THE INTERPOSITION OF THIS COURT.

The extraordinary process of certiorari is invoked by the petitioners under section 6 of the act of March 3, 1891 (26 Stat., 826), to review the final decision of the Circuit Court of Appeals for the Fourth Circuit, ordering the dismissal of the petitioners' bill filed in the Circuit Court for the District of West Virginia, substantially for the purpose of procuring a permanent injunction against the respondent from using the word "Pocahontas" as applied to the coal he was marketing, originating in the celebrated Pocahontas coal fields, situated in Virginia and West Virginia. (See maps, Record, 36 *et seq.*, 164 *et seq.*)

In cases of this character the writ of certiorari is not a writ of right; it is addressed to the sound discretion of the court. It is said in Lau Ow Bew's case (141 U. S., 583; 144 U. S., 47), that this branch of the jurisdiction of the court

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"should be exercised sparingly and with great caution," and in American Construction Co. *vs.* Jacksonville R. R. (148 U. S., 372), it is said that not only should this branch of the jurisdiction of the court be exercised sparingly, but adds that it should be done "only in cases of peculiar gravity and importance, or in order to secure uniformity of decision;" and up to that time only two writs of certiorari had been granted, although there had been many applications for the writ. In Chetwood's case (165 U. S., 443) it was said that "the writ may be allowed whenever the circumstances imperatively demand that form of interposition."

It is therefore clear that a case must present unusual and important features or it will not be considered in this court; and as the issuing of the writ is entirely within the discretion of the court, therefore, in arriving at a decision upon a question of this sort, the court will critically examine into the necessity of the proposed review, and the importance as well as the merits of the controversy.

In view of the extreme caution with which the court proceeds in cases of this kind it should not esteem a case to be important simply from the allegations contained in the petition, unless the allegations are supported by distinct and positive testimony, which is wanting in the case the petitioners have seen fit to present.

II.

IT IS NOT SHOWN THAT THE QUESTION IS OF FINANCIAL IMPORTANCE.

Whatever may be the real money value of this word as a trade-mark, the only evidence as to its value to be found in the Record is upon page 13, where it appears that the entire right to use the word was sold to the petitioners for the insignificant sum of five dollars, so recently as April 1, 1895.

The bill of complaint alleges that the right to use the word "Pocahontas" as a trade-mark for the coal produced in its mines originated with the Southwest Improvement Company, and from the assignment on page 13 of the Record, it appears that that company parted with all its right to use

that trade-mark for the sum mentioned; and while in ordinary cases it would hardly be proper to say that that sum necessarily represented the actual value of the thing conveyed, in a case of this kind, where jurisdiction is entertained with great caution and reluctance, proof of the magnitude of the interests involved should distinctly appear, and in the absence of such proof the court cannot assume the use of the name as a trade-mark to be of greater value than the sum for which it is stated to have been so recently sold.

III.

THE PETITIONERS HAVE NOT CERTIFIED TO THIS COURT THE PROCEEDINGS IN THE MASSACHUSETTS CASE.

The petitioners have filed with their writ a certified copy of the transcript of record of the case in the Fourth Circuit, but they have only brought into the case in this court an uncertified copy of the opinion of Judge Putnam from the proceedings in the First Circuit, which appears as an appendix to their petition, and the petition should be dismissed because they have not presented a full record of the cases in both courts.

IV.

THE QUESTIONS DECIDED BY THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT WERE NOT THE SAME.

It is alleged in the brief *contra* that the cases are practically identical; enough appears in the opinion of Judge Putnam, as recited in the petition, to demonstrate that the questions considered by the two courts are not even similar. The decision of the Circuit Court of Appeals for the Fourth Circuit, which was argued November 8, 1897, and decided favorably to the respondent May 3, 1898, after seven months deliberation, and again decided favorably to the respondent May 19, 1898, upon a motion by the petitioners for a re-

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hearing, was based upon a careful finding of the facts set out in full in the opinion of Judge Goff, hereto annexed, and proceeded substantially upon the grounds that the claims of the petitioners in the original bill "were very largely erroneous and not proven;" that when the first coals were sent to the market in July, 1883, and for more than a year before that time, the name "Pocahontas" had been used as a geographical name indicating the locality; that a Government post office had been established, for a year or more at that point, under the name of "Pocahontas," and that name had also, before the establishment of the post office, been given to the railroad station at that point, and the court found, therefore (and could not properly have found otherwise), that the word "Pocahontas," before the appearance of the coal of this extensive field in the markets of the country, had become a word of well-known geographical significance, not only then applied to the post office, the settlement and the railroad station, but also the whole field itself, denoting that large and valuable section of the Virginias, famed the world over for the remarkable, valuable and useful coal and coke that it produces of a uniform character (Record, pp. 151 *et seq.*); and applying to the facts so found, from a consideration of the whole case, bill, answer, replication and proof, that doctrine of the law so often recognized by repeated decisions of this court, that a geographical name cannot be appropriated to the exclusive use of a person or corporation as a trademark, the Circuit Court of Appeals for the Fourth Circuit brushed aside the gauzy, cob-webby, fictitious claim of the petitioner to the exclusive use of this geographical name, and held that every operation in this important field, every operator in this great industrial production, each and all had the right to market coals under that name, because that name correctly indicate its geographical origin.

On the other hand, the case decided in the First Circuit, as appears from the opinion of Judge Putnam, was not in any sense a final decree; it was only a decision upon appeal from an interlocutory order allowing an injunction in the case of the petitioners against Atwater & Co., as appears from the

first paragraph of the opinion, where it is said that "*this is an appeal from an order granting a temporary injunction*, and relates to the alleged trade-mark or trade-name, 'Pocahontas,' used in the coal traffic."

The original order allowing the injunction and the decision on appeal were not based upon anything except the *ex parte* affidavits filed upon the motion for a preliminary injunction; in this court we do not know what the affidavits were, but we do know that the discussion was restricted to a mere question of agency, as appears from the following citation from the brief filed in the Circuit Court of Appeals for the First Circuit by the same counsel who appear here in this proceeding for the petitioners. The citation is from page 7 and is as follows:

> "Such being the facts in the case, his honor, Judge Colt, upon the argument below, restricted the discussion to two points, namely: *First*, the relationship existing between Coffman and Atwater & Co.; and *second*, whether or not the coal sold to Atwater & Co. was exempt from the operation of the injunction order in the Coffman suit. In thus restricting the discussion it was evident that Judge Colt was of the opinion that the decree of the West Virginia court was *prima facie* evidence of the appellee's right to the trade-mark, and that that right was sufficiently established for the purposes of a motion for preliminary injunction."

The exact question presented to the Massachusetts court was whether a preliminary injunction should be issued, and the decision was based solely upon the question as to whether Atwater & Co. should be enjoined in Massachusetts by a preliminary order for the reason that Coffman had been placed under injunction by the Federal court in West Virginia, and had shipped coal pending the injunction to Atwater & Co., and that firm had placed it upon the market to be sold as "Pocahontas" coal; and upon the motion for the preliminary injunction the claim was made that Atwater & Co. were the agents of Coffman and that the injunction against Coffman in West Virginia should be operative against Atwater & Co., his agents in Massachusetts, the argument being restricted to these points by Judge Colt in the inferior court; of course,

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nothing else but the question of agency could be properly considered in the appellate court. The conclusion of law which Judge Putnam decided was that as the injunction was proper when issued by Judge Colt, he could not do otherwise than to sustain his ruling, and without reference to what had occurred in the interim. This appears from the following extract from his opinion:

> "Since the granting of the injunction in the case before us by the court below, and since the appeal to this court and the arguments at bar on the appeal, the Circuit Court of Appeals for the Fourth Circuit, in Coffman *vs.* Castner, by an opinion passed down May 3, 1898, has held that the claimed trade-mark, or trade-name 'Pocahontas' cannot be sustained, and has reversed the adjudication of the Circuit Court to which we have referred, and has remanded the cause to that court with instructions to dismiss the suit. As the complainants in this case were the complainants in the case in the Fourth Circuit, it may be that if this had occurred before the action of the court below, now appealed from, no temporary injunction would have been granted. But as the injunction was granted before the decision by the Circuit Court of Appeals was announced, the position is radically different. THE ORDER WAS CLEARLY PROPER WHEN MADE, AND IF THE CIRCUMSTANCES REMAINED UNCHANGED WE COULD NOT REVERSE IT."

But that there might not be any misunderstanding as to the exact decision, he says:

> "Some incidental matters were brought to our attention by the parties, but we believe all of them are rendered unimportant in view of the conclusions which we have stated. *As neither party takes from our decision anything substantial,* and as the circumstances are without precedent, we are not satisfied that equity requires that the appellants should pay the costs of this appeal."

There can be but one conclusion; the decision in the Fourth Circuit was upon the whole case, the decision in the First Circuit was upon a preliminary question only, and that question was restricted to one of agency between Coffman and Atwater & Co., a question which could not have arisen in the Virginia case; the proposition which was sustained by Judge

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Colt, and by the Circuit Court of Appeals in the First Circuit was based upon the theory that the decision of the Virginia court established a *prima facie* case, and the right of the petitioners to appropriate the name of "Pocahontas" as a trademark was considered as settled for the purposes of the Massachusetts case, and for that reason was not permitted to be inquired into. The finding of the Virginia court (now overruled), was accepted as conclusive upon the property right of the petitioners, and the only question was whether the affidavits filed in support of the motion for the preliminary injunction sufficiently established a condition of agency between the defendants in the Massachusetts case and the defendant under injunction at that time in the Virginia case.

The decision in the Court of Appeals for the First Circuit, Judge Putnam presiding, seems to have been one of practice merely, and to have involved a construction of the recent legislation allowing appeals from interlocutory orders allowing injunctions; the appellate court, in this instance, holding that it would not consider any new circumstances or conditions which might arise between the time of the granting of the injunction in the inferior court and the hearing upon that question in the appellate court, presumably holding that if any new circumstances or conditions had arisen in the interim they must first be presented to the inferior tribunal before they could be considered by the appellate tribunal. If this be the correct interpretation of the new statute, it certainly tends to vexatious delays in the administration of justice. In the case at bar the preliminary injunction was granted in the inferior court, taking for granted that the petitioners had a meritorious case, because the court of a sister jurisdiction had then so held and had issued its injunction; and so that court would permit no inquiry back of the relation of agency which was claimed to exist between the defendant in the one jurisdiction and the defendants in the other, and while the injunction granted in the second jurisdiction was pending, the controlling appellate court in the first jurisdiction disposed of the petitioners' case there upon a careful consideration, for want of equity, and so the anoma-

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lous situation is found that parties are under injunction upon a conclusion that their adversaries have a meritorious case on the doctrine of *stare decisis*, after the decision no longer stands. The learned judge, who delivered the opinon in the Massachusetts case, seems to have overlooked that the structure built up in the inferior court had lost its foundation, and sent the litigating parties back to the inferior tribunal upon this merely preliminary question, for a decision as to the new circumstances and conditions that had intervened, and months hence all the parties will probably be back in the appellate court to have heard and determined the question which seems to have been fully before the appellate court, and could have been properly determined finally without being tossed backwards and forwards between the two branches of the court in the Fourth Circuit.

Lack of uniformity of decision can only occur where the same questions are submitted and considered by each of the courts.

Had there been a decision by the Circuit Court of Appeals for the First Circuit that the petitioners had the exclusive right to the use of this word as a trade-mark, after hearing all the proofs submitted by both parties in support of their respective pleadings and an exactly opposite decision against the petitioners by the Court of Appeals for the Fourth Circuit, and it had been shown by evidence (which is wanting here) that the subject matter of the litigation was of importance, financially or otherwise, possibly the court would be warranted in issuing the writ prayed for, but that is not the situation which this case presents; on the one hand we have a full, complete and exhaustive trial and adjudication of a question, properly and zealously submitted, resulting in a final decree which cannot be reviewed except upon a case so made out as to appeal irresistibly to the sound discretion of this court; on the other hand, the so-called differing decision was in no sense final but preliminary, interlocutory and temporary merely, and where the substantial merits of the petitioners' case was assumed erroneously, as it turns out, and heard and determined on *ex parte* affidavits, in a cause before pleadings, ex-

cept the filing of the bill and before the taking of any proof whatsoever. Surely, this cannot be said to present "identity of question" or "divergence of decision." It is true that Judge Putnam, in his decision, intimates that by reason of long acquiescence in the use of the trade-mark by the petitioners, they may have acquired a proprietary right to this word, but it is to be remembered that the whole case was not before him, and it is shown in a subsequent portion of this brief that Judge Putnam was misled as to material facts.

Again, Judge Putnam intimates that had the Circuit Court for the Fourth Circuit dismissed the bill on appeal before the case was brought in Massachusetts, no temporary injunction could have been granted. If that be so, how can it be said that this court will now take jurisdiction? If the dismissal of the Virginia case would prevent a preliminary injunction in the Massachusetts case, by analogous reasoning such dismissal ought to prevent consideration of the present petition by this court.

V.

THE DECISION IN THE FIRST CIRCUIT WAS RENDERED UPON EX PARTE AFFIDAVITS MERELY, EVIDENTLY SO FRAMED AS TO MISLEAD THAT COURT IN MATERIAL MATTERS.

This proposition appears conclusively from the following citation from Judge Putnam's opinion:

> "This" (the word Pocahontas) "has been used for fully twenty years by the complainants below and their predecessor in a very extensive trade with unbroken acquiescence until the controversy out of which this litigation arose in this circuit and in the fourth circuit."

Now it conclusively appears that the name "Pocahontas," as applied to the territory producing this coal, did not exist until 1882; it was not applied to shipments of coal until 1883; it was not attempted to be registered in the Patent Office until 1885; instead of there being an acquiescence on the part of the public in the exclusive use by the petitioners of this word as designatory of their coal, there has

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been a long-continued acquiescence on the part of petitioners "until the controversy out of which this litigation arose" in the use by all of the operators in that field of this word as designating their output, quite a respectable percentage of that output not being represented by the petitioners.

Mark the words of Judge Putnam that this word had been used for FULLY twenty years (prior to 1896) by the complainants and their predecessor.

Could the petitioners here have shown to the Massachusetts court, as appears from the affidavit of Castner, that in 1881 the present coal field was an unexplored wilderness? Certainly not; "fully twenty years" would carry the use of this word to a date five years before the time when Castner describes the field as having not even been explored.

Could the petitioner, Castner, have stated in his affidavit in the Massachusetts case, as he states in this case, that it was not until 1882 that the mines were opened, or that the first shipments of coal were made in 1883? Certainly not; it would be an insult to the intelligence of the learned and painstaking judge, who rendered the decision in the First Circuit, to suppose that upon the showing made in this case he would have extended the period of the unsupported claim of barely thirteen years to "fully twenty years."

And in regard to the finding by Judge Putnam that the complainants below had used this word, "with unbroken acquiescence," it cannot be possible that it was shown in that case, as appears from their own evidence in this, that more than a year before any shipment of coal was made under the name of "Pocahontas" the entire field, the settlement, the post office and the railroad station were all known by that name. Nor could it have appeared, as the petitioners by their own evidence claim to have been the situation in the Virginia case, that this name, by acquiescence of the petitioners and the Southwest Virginia Improvement Company, had been used as designating coal other than that produced by the mines of the Southwest Company; nor that from 1884 to the advent of the respondent as a factor and dealer in coal at Pocahontas, the "combine," consisting of all the operations in the field,

practically sold all of their coal to the Norfolk & Western Railroad Company, who appointed the petitioner's corporate predecessor as "general tidewater agent," and who handled only seventy per cent of the output of the mines through that agency; the remaining thirty per cent having been disposed of by the "general coal agent," altogether a different official from the "general tidewater agent," appointed by the Norfolk & Western Railroad Company under the coal producers' contract; all being sold as "Pocahontas" coal; therefore, it could not have been shown in the Massachusetts case the fact which so plainly appears in this case, that at no time since the opening of the field have the Southwest Virginia Improvement Company or Castner & Curran been the only operators to use that word as descriptive of the coals they sent to market.

Instead of there having been, therefore, an "unbroken acquiescence" in the exclusive use of this word by the petitioners, it may be well said that there has been an unbroken acquiescence on the part of the Southwest Virginia Improvement Company and the petitioners to the use of this word by operators and producers and sellers of coals other than those produced by that company.

So much for the actual misrepresentation of the facts which it is apparent must have been made by the petitioners in order to have so thoroughly misled the courts in the Massachusetts case. It must also have been true that the truth was suppressed in many particulars. Could the petitioners have brought to the attention of the Massachusetts court the application made by Castner & Curran to register this word in the U. S. Patent Office, in August, 1885, claiming it as their own symbol to the exclusion of the Southwest Virginia Improvement Company, under whom they sometimes claim, and every one else? Could they have furnished to that court the exact date of the establishment of the post office and all those other facts which show, conclusively, that in this coal field the word "Pocahontas" referred to the general coal deposit and not to coal having its origin with the petitioners?

All of these suggestions must be answered in the negative.

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That Judge Putnam was imposed upon in these particulars is plainly apparent from the language he used, which is quoted above, and his order is plainly based upon the meagre, misleading and incorrect statements which zealous counsel evidently saw fit to put into the *ex parte* affidavits filed in support of their motion for the preliminary injunction; we appeal with confidence to the finding of the court in the Fourth Circuit as to all the facts pertaining to this controversy, and particularly as to the subject of acquiescence, bearing in mind that the petitioners' claim is based upon the pretension that the word "Pocahontas" relates to coal inspected by them; "acquiescence" means acquiescence in that claim, for there could be no such thing as acquiescence in the use of a geographical name simply unless it imported some special characteristic pointing to the petitioners. On this point Judge Goff says:

> "Pocahontas is a word of well-known geographical significance."
>
> "The entire field is now known as Pocahontas and the Pocahontas Flat Top Coal Field."
>
> "The word Pocahontas then (1883) denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was shipped, and it also indicated in business matters the *natural product of all that region.*"
>
> "The complainants are not entitled to the exclusive right to use the word Pocahontas as descriptive * * * of the character of the coal mined in the Pocahontas coal field, and all the producers of that product in that section have the right to use it in common with the complainants. That word has acquired a generic meaning, and from the evidence before us it is clear that in the business world it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vender of the same. All the mine owners, who by their labor succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth."

VI.

THE PETITIONERS' CASE IS WITHOUT MERIT.

It is quite unnecessary to amplify upon the opinion of the Circuit Court of Appeals for the Fourth Circuit, as announced by Judge Goff, and I assume that this court will accept the facts as stated by the court, should the court reach the question of the merits of the petitioners' case.

I desire, however, to call the attention of the court to some considerations which are not touched upon by Judge Goff in his opinion, but which seem to me to be in and of themselves controlling of the question.

(*a*) While the output of the Pocahontas coal field is quite extensive, there is still left in that field a very large territory wholly undeveloped, through which this valuable deposit exists of a uniform character. (Record, p. 151 *et seq.*) The petitioners claim to have given a geographical name to the locality, and the same name to the coal which the case shows to be of a uniform quality; and whether the name was given first to the locality or the coal deposit, is not a matter of importance; because having combined the geographical name with that of coal, the entire deposit is now known in the market by the name of Pocahontas. They have given that name, therefore, not only to the product of the Southwest Company but also to the product of all the collieries they have from time to time represented, irrespective of the exact place of production, and so they have attached the name to all the vast territory, and for this reason ought not to be permitted a monopoly of the name.

(*b*) When this bill was filed the respondent was the factor and agent for the sale of the product of the Browning mines, which are located within the town of Pocahontas, and that product had formerly been sold by petitioners as Pocahontas coal; there can be no question, therefore, as to his right to sell the product of those mines as Pocahontas coal; he was also, at that time, the agent and factor for the sale of the product of the Indian Ridge Mines, for which the petitioners had previously been the agents and factors; and while the petitioners were the agents for both these mines they marketed

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the product as Pocahontas coal, and had caused it to be known in the public markets by that name; and having impressed that name upon the product when they surrendered their agency, it having become known by the name they claim to have given it, they cannot deny the after use of that name to the owners.

(*c*) The court will observe that the petitioners have not adhered to the same claim with reference to their right to use this word as a commercial trade-mark. Up to the time of the bringing of the suit they claimed under the registration of August, 1885, in which it was only claimed that the trade-mark had been used continuously since about January 1, 1885. As the case shows that long prior to that time the word had become a well-known geographical name, the petitioners seem to have abandoned all claim on account of that registration and now try to rely on the right of the Southwest Virginia Improvement Company, which they say originated in 1882; the court will not fail to observe that if the right upon which they now rely as assignee of the Southwest Improvement Company existed in August, 1885, the application at that time of the petitioners for registration of that word as their trade-mark was a fraud upon the rights of the Southwest Company.

No one can read this case without coming to the certain conclusion that the geographical name of the locality in which these extensive mines are situated gave the name to the coal in the market; and it would be unconscionable to permit the owners of so small a portion of this vast field to now monopolize that name which they have at least abandoned to the scandalous and illegal combination, provided for by the coal producers' contract, to be found on pp. 19 *et seq.* of the Record. It is that combination of interests which seeks, in this illogical proceeding, to shut out of the markets of the world all of this great coal-producing field, excepting only those operators who are willing to subject themselves to the domination and control of the only railroad serving that locality, and its wicked side-partners and whippers-in, who are the petitioners for this extraordinary writ.

Respectfully submitted,

A. G. SAFFORD,

Attorney for Respondent.

United States Circuit Court of Appeals.

FOURTH CIRCUIT.

No. 231.

W. H. Coffman, Appellant,
vs.
Samuel Castner, Jr., and Henry B. Curran, Appellees.

In Equity.—Appeal from the Circuit Court of the United States for the District of West Virginia.

(Argued November 8, 1897. Decided May 3, 1898.)

Heard by Goff, Circuit Judge, and Brawley and Purnell, District Judges.

S. C. Graham, of Henry & Graham, Counsel for Appellant;
Arthur V. Brieson (J. Walter Douglass and Henry E. Everding, on Brief), Counsel for Appellees.

Goff, Circuit Judge:

This is an appeal from an order of the Circuit Court for the District of West Virginia, entered on the 5th day of May, 1897, in the chancery cause of Samuel Castner, Jr., and Henry B. Curran, trading under the firm name of Castner & Curran, against W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company, and also as W. H. Coffman Coke Co. By such order the defendant below, appellant here, was in his own name, and in the name of the Pocahontas Coke and Coal Company, and also as the W. H. Coffman Coke Company, together with his servants, attorneys and associates, restrained and inhibited from using the name "Pocahontas" or "Pocahontas Flat Top" in connection with his business, the court being of the opinion that "the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that they have the sole right to use said word as indicating the character of coal they sell." From this decree the defendant below, under the provisions

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of section 7, of the act approved March 3, 1891, entitled "an act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," sued out this appeal.

The bill alleges that about the year 1882, in the State of Virginia, a tract or field of smokeless bituminous or semi-bituminous coal was opened and mined by the Southwest Virginia Improvement Company, a corporation organized and doing business under the laws of the State of Virginia; that shortly thereafter, but still in the year 1882, the said corporation named their mine "Pocahontas" and began selling the coal therefrom as "Pocahontas" coal, having adopted the trade-mark "Pocahontas" as designating its said output; that prior to the first day of January, 1884, Castner & Co., Limited, a partnership formed under the laws of the State of Pennsylvania, did purchase from the said Southwest Virginia Improvement Company the coal so mined, and did ship and sell the same principally at tidewater points under the name of "Pocahontas" coal; that they as such partnership association dealt in, inspected, shipped and sold from said region or field as "Pocahontas" coal in large quantities, and under the license of the Southwest Virginia Improvement Company, advertised, shipped, and billed the same "Pocahontas" coal, uniformly designating it as such coal; that in the year 1889 the complainants became the successors and assigns of said Castner & Co., Limited, and continued the same business under the name of Castner & Curran, dealing in and selling large quantities of said coal under the trade-mark designation of "Pocahontas" coal, shipping, billing and advertising the same as "Pocahontas" coal, and as "Pocahontas" Flat Top coal, and that they, by reason of the careful inspection and purification of their coal, greatly increased from year to year the sale of the same; that complainants and their predecessors, Castner & Co., Limited, from the year 1883 until the bringing of this suit, during the first twelve years thereof, with the license of the Southwest Virginia Improvement Company, and thereafter as owners of the said trade-mark, uninterruptedly carried on said coal business, and have continuously inspected, shipped and sold large quantities of coal under the said trade-mark of "Pocahontas;" that on April 1, 1895, by an assignment in writing duly executed by the Southwest Virginia Improvement Company, the complainants became the owners of the entire right and title, interest and good will in and to the trade-mark "Pocahontas," with the exclusive right to use said word as a designation for all coal thereafter sold by them from said field, and became vested also with the exclusive right to sue and recover for all gains, profits and damages arising out of past, present or future infringements of the same; that they have devoted much time and expended large sums of money

in inspecting, selecting, grading and maintaining the superior quality and purity of the said coal, whereby it has acquired and now possesses a great reputation in the markets of the world under the name of "Pocahontas," or "Pocahontas" Flat Top coal, and that it has been and is now much sought after by dealers and the public; that complainants have the sole and exclusive right to the use of the word symbol "Pocahontas" as a trade-mark for coal, and that it is of great value to them in their business. It is also set forth in the bill that the public and the dealers in coal have generally acquiesced in complainants' exclusive rights to such use, and that they have not knowingly permitted the unlawful use of such trade-mark by others; that prior to November 1, 1896, complainants controlled the output of the various collieries in what is known as the "Great Flat Top Coal Region," including the Indian Ridge Coal & Coke Company; that they sold so much of this output as came up to the grade of "Pocahontas" coal in quantity, purity and size as "Pocahontas" coal, but that the output of the Indian Ridge Company was impure and required special care and attention, and yielded but a small proportion of the "Pocahontas" coal, as it was marketed by complainants; that the defendant, W. H. Coffman, is a factor or agent engaged in the sale of coal and coke at Bluefield, West Virginia, and elsewhere, selling and advertising for sale bituminous and semi-bituminous coal from the Indian Ridge Colliery, which is inferior in quality and purity to the coal sold by complainants, and is not of the standard as to quality and purity established by them; that he, intending to deceive dealers and the public, and to cause purchasers of his coal to believe that the same was sold by complainants, or is of the quality sold by them, has at Bluefield and elsewhere offered for sale and sold a very inferior and impure coal under the name and designation of "Pocahontas," and has in advertising and selling the same used the word symbol "Pocahontas," and in letters, notes and bills has displayed the words "Pocahontas Coal," or "Pocahontas" Flat Top Coal, whereby the purchasers of his coal are liable to be, and will be deceived, and caused to purchase defendant's coal as that sold by complainants; that as a matter of fact purchasers have been so deceived, and that the reputation of "Pocahontas" coal has been thereby tainted; that the defendant intends to and will continue so to do, unless prevented by the order of the court below. Other statements in the bill are not referred to, the same being unnecessary so far as the questions we are now to consider are concerned. A large number of affidavits were filed by complainants and defendant, which, as well as the answer of the defendant, treated as an affidavit, and the exhibits with it and the bill were read and considered by the court in disposing of the motion for an injunction.

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Certain propositions of law, now well established, applicable to this case, will be referred to in the outset as guiding us in our investigation of the same, and as plainly indicating, in connection with the facts as we find them, the result we now announce. A trade mark is intended to designate the origin of the particular article to which it is affixed, or to which it particularly refers, and it gives notice to the world who the producer of that article was. A name may be used for this purpose, or a certain mark or peculiar device may be employed, provided they have not theretofore been appropriated by others for the same purpose. But the right to select such names, marks and devices is governed by certain rules and limitations which have been found and announced by the courts. On this point the Supreme Court of the United States in Canal Company vs. Clark, 13 Wall., 311, 323, said: "The trade mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of The Amoskeag Manufacturing Company vs. Spear, 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any word, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and, therefore, have an equal right to employ for the same purpose.'

"And it is obvious that the same reasons which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the article of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated

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exclusively the appropriation would result in mischievous monopolies. Could such phrases as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco,' or 'Sea Island cotton' be protected as trade marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations, it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trade-marks are entirely overlooked. It cannot be said that there is any attempt to deceive the public when one sells as Kentucky hemp or Lehigh coal, that which in truth is such, or that there is any attempt to appropriate the enterprise or business reputation of another who may have previously sold his goods with the same description. It is not selling one man's goods as and for those of another. Nothing is more common than that a manufacturer sends his products to market, designating them by the name of the place where they were made. But we think no case can be found in which other producers of similar products in the same place have been restrained from the use of the same name in describing their goods. * * * It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer in describing truthfully his product, of a name or a combination of words, already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

In the same case it was held that the word Lackawana, the name of a section of the State of Pennsylvania, could not be combined with the word coal, and made a trade-mark which would be protected by law, for the reason that every one who mined coal in the valley of the Lackawana was entitled to the right of representing it as coming from that region and as being Lackawana coal

In Columbia Mill Co. vs. Alcorn, 150 U. S., 460, 466, the Supreme Court says: "The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have had to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property. They do not, in and of themselves,

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indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership." In the same case it was said: "These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed as its primary object and purpose to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

In Laughman et al. vs. Piper et al., 128 Penn. S., 1; 5 L. R. A., 599, it was held that when the article to which a geographical name is applied is the product of the place named, the term cannot be used as a trade-name by one to the exclusion of others, owners of like produtcs of the same place; hence the term "Sonman," which has received a distinct geographical recognition from the public, it being the name of a large boundary of land containing a number of private estates owned by different persons, all of whom are engaged in the same business of mining and shipping coal, and having within its limits a village of the same name, cannot be appropriated by one of such persons as a trade-name to the exclusion of the others, although the tract is not an independent region, and cannot be considered a separate coal basin or sub-basin.

In the case of Glendon Iron Co. vs. Uhler, 75 Pa., 467; 15 Amer. Rep., 599, the court said: "Glendon is the name of the town in which the business of each party is located and carried on. It is an incorporated borough. Being then the name of an incorporated town, the main question is whether the appellant lawfully has the exclusive right to use it as a trade-mark. It is conceded as a general rule that the name of a town or city cannot be so appropriated as the exclusive property of any one. This view is well sustained by authority. High on Injunctions,

673; Bispham's Eq., 411; Wolfe vs. Goulard, 18 How. Pr., 64; Brooklyn White Lead Company vs. Masury, 25 Barb., 416; Newman vs. Alvord, 49 id., 588; Candee vs. Deere, 54 Ill., 439; S. C. 5 Am. Rep., 125; Del. & Hud. Canal Co. vs. Clark, 13 Wall., 411.

"It is contended by the appellant that this case is taken out of the general rule, inasmuch as the trade-mark was adopted prior to the incorporation of the borough, and before there was any town at that place. No authority is cited which supports this distinction. The case of Woterspoon vs. Currie, 23 L. J. Rep., 443, is clearly distinguishable. It is known as the Glenfield starch case. It is true the injunction was there granted; but the complainant and respondent were not both engaged in carrying on the same business in the same town or city. There was no town, no city there. The Lord Chancellor says: 'Glenfield is not a town, * * * it is not a parish, it is not a hamlet, it is not a district of any special character, but it was an estate of that name upon which some people seem to have erected some houses or manufactories, and upon which now some sixty people are living.' It will not do to apply to an incorporated borough in this State the same rule that may be applicable to an estate in England. Such a borough is essentially of a public nature; the estate is of a more private character. The name which an individual may give to his estate is unlike that which legislative sanction has given to a municipal corporation. The rights of the public in each are radically different.

"The appellee did not falsely represent the place of their business location. Their pig-iron was actually manufactured within the borough of Glendon. * * * The appellees put upon their pigs the initials of their firm and the name of their town. That name was Glendon to the whole world. It cannot be that the previous appropriation by the appellants of the word which now is the name of the town prevents any other manufacturer of pig-iron, within its limits, from using the same word. If it be so now it may continue through all coming time. The boundaries of the town may be enlarged. The borough may grow into a city. The manufactories of pig-iron may be multiplied, yet the word most expressive to indicate their location must be denied to all, save one. * * * We see nothing in the facts of this case, even as found by the master, to take it out of the general rule which denies to one the exclusive use as a trade-mark of the name of the town in which the same kinds of goods are manufactured by others."

In Connell vs. Reed, 128 Mass., 477; S. C. 35 Am. Rep., 397, Chief Justice Gray says: "Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words ('East Indian') in connection with the manufacture and sale of medicines, it is at least doubtful

whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right." In the case of Evans vs. Von Laer, 32 Fed., 153, Judge Colt held that as Montserrat was the name of an island in the West Indies from which both the plaintiff and defendant imported lime juice, the former, in the absence of fraud, was not entitled to the exclusive use of the word "Montserrat" as a designation for lime juice, even though the plaintiff's article may have acquired a high reputation for purity and strength, while that of the defendant was of an inferior quality.

In Genessee Salt Co. vs. Burnap, 73 Fed., 818; 20 C. C. A., 27, 43; U. S. App., 243, 250, the court said: "It is well settled, and we have just had occasion to decide in this court that words merely descriptive of the character, quality, and composition of the article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark. California Fig Syrup Company vs. Frederick Stearns & Company, 43 U. S. App., 234; Brown Chemical Company vs. Myer, 139 U. S., 540; Canal Company vs. Clark, 13 Wall., 311. The name 'Genessee,' when used in connection with the complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it."

In the case of Candee, Swan & Co. vs. Deere & Co., 54 Ill., 439; S. C. 5 Am. Rep., 125, the court held that there can be no trade mark in the words "Moline Plows," as Moline was the name of the town in which the plows were made, and said: "Is it possible, can it be tolerated for a single moment, that a maker of plows at Moline shall not be permitted to sell his work as a Moline plow; to advertise them in every form as the Moline plow? Would it not be the truth, and shall a manufacturer be prevented from publishing to the world where his wares are made? * * * Any number of plow makers can go with impunity to Moline and establish there plow factories, and brand on their plows their own name and the name of the town, and send them broadcast over the country, to the joy of our farmers and to the common benefit of all."

These cases firmly establish the questions of law applicable to the contention we are now to dispose of, and they clearly indicate the result we have reached. A geographical name cannot be appropriated to the exclusive use of any person or company, as a trade-mark, and if adopted as such it must be used subject to the right of others doing business in the section of country to which it applies, to make like use of it in matters properly pertaining to their business in that locality.

It is clear from the evidence that Pocahontas is a word of

well known geographical signification, denoting that large and valuable section of the Virginias, famed the world over for the remarkably valuable and useful coal and coke that it produces. Prior to 1882 this region was comparatively unknown, and entirely in the primeval state in which nature had left it, constituting a part of the Great Flat Top Mountain portion of Southwest Virginia and southeast West Virginia. In the years immediately preceding 1882 this wilderness had been sought out and explored by those who represented the capital and energy by which it was afterwards developed. The experts sent into its theretofore hidden recesses returned with the report of its fabulous wealth and wonderful possibilities. The result was the extension of the Norfolk & Western railroad into and through the Great Flat Top region, and the organization of the Southwest Virginia Improvement Company, under whose auspices the mines were opened and coal was first shipped. The development inaugurated by this company was commenced during the fall of 1881, continued in the year 1882, and the railroad was completed to the mines in the spring time of the year 1883. The town located at the point where the first mine was opened was early in the year 1882 named Pocahontas, and the postoffice which was established by the Department at Washington on the 30th day of June, 1882, was likewise then called by the same name. The first coal shipped to the tide-water markets left the mines in July, 1883, and it was billed and sold as "Pocahontas Coal."

The entire field is now known as the "Pocahontas" and the "Pocahontas Flat Top Coal Field." It embraces large portions of Tazewell and Wise counties in the State of Virginia, and of Mercer, McDowell, Wyoming and Raleigh counties in the State of West Virginia. It is divided into three sections, or working divisions; the Pocahontas, which includes all the mines around the town of Pocahontas; the Bluestone District, embracing the improvements on the Bluestone River; and the Elkhorn, the country in McDowell county on the Flat Top Mountain. The coal shipped from all this section is known in the markets of the world as "Pocahontas coal," evidently so called from the town of that name in which the first mine was located, and from which the first shipments were made. The coal beds are above the water level and range from five to thirteen feet in thickness, extending through an area of about five hundred square miles, or three hundred and twenty thousand square acres. An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near two hundred and thirteen thousand square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say two billion one hundred and thirty million tons. At the time when this suit

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was instituted, thirty-eight different coal and coke companies were operating in the field, all of them advertising, mining and selling the coal excavated from the Pocahontas vein, and known as the "Pocahontas Flat Top Coal." For the manufacture of coke over five thousand ovens had been constructed and were in use. During the year 1883 ninety-nine thousand eight hundred and seventy-one tons were mined, the output in the following years rapidly increasing until, in 1894, three million eight hundred and eighty-eight thousand and fifty-eight tons were sent to market. For the purpose of illustrating the almost inexhaustible resources of the field, it may be stated that at this rate of production,—as shown by the returns for the year 1894,—it would require about five hundred and forty-eight years to exhaust the seam now being worked. And it is as to this entire body of coal that the complainants claim the exclusive right to use the word "Pocahontas," as descriptive of its origin and quality.

There is no evidence to sustain the allegation in the bill that the Southwest Virginia Improvement Company began selling coal in the year 1882 from the Pocahontas mine, nor that it made any sales of "Pocahontas coal" in the year 1883, in the sense that these words are used in as a trade-symbol. Nor is there any satisfactory evidence tending to show that said company adopted and used a trade-mark, or made any effort to establish one, as such, prior to the year 1885. It is true that in the assignment made by the Southwest Virginia Improvement Company to the complainants, it is recited that said company "did adopt on or about the first day of July, 1882, as a trade-mark the word-symbol 'Pocahontas,'" but surely that statement in such a paper, made under the date of April 1, 1885, cannot be considered as proving that fact, and the record has been searched in vain for testimony establishing it.

The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the postoffice of the same name had been in existence for a year at least. The claim of complainants, that the town had no existence until January 31, 1884, the date of the act of the Virginia Legislature incorporating it, and that, therefore, it was not known legally, in a geographical sense, prior to such date, is not, in the light of the testimony, and in connection with the important questions herein involved, entitled to the consideration given it by counsel. There can be no doubt but that at the time the first shipment of coal was made by the Southwest Virginia Improvement Company, the town of Pocahontas was in existence, the postoffice had been established, and that the coal itself was sent from the station of that name. The word "Pocahontas" then denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was

shipped, and it also indicated in business matters the natural product of all that region. It follows, therefore, that it could not then be used as an exclusive trade-mark, and as a matter of fact it was not so employed until some time thereafter. We are impelled to find from the testimony that in the early shipments of coal the word Pocahontas was used, not as a word-symbol or trade-mark, but simply as the name of the town from whence it came, for the purpose only of pointing out the place of production. The coal had not then been used, and it had not produced the wonderful results that it subsequently did; its reputation had not been made, and it had not at that time found its way to the marts of the world, to the furnaces of land and sea. The operators of that section, and their vendees, including complainants' predecessors, had not then been given the opportunity to inspect, grade and purify it, so as to make it typify the high degree of excellence that it now enjoys, and there is no evidence tending to show that selection and inspection were then resorted to, other than is usual in all mines. The first direct evidence bearing on the trade-mark is the application of August 25, 1885, made by Castner & Company (Limited), to register the word "Pocahontas" at the United States Patent Office. Such registered trade-mark is not now relied upon by complainants, why we have not been advised, but likely for reasons connected with the decision of the Supreme Court in the Trade-Mark Cases, 100 U. S., 82. It is, however, worthy of notice that such application was made under the provisions of Sec. 4937, Rev. Stat. of the United States, which require the party so applying to set forth in the statement made by him the length of time, if any, during which the trade-mark had been in use, and that said applicants in their statement so filed used this language: "This trade-mark has been used continuously by said corporation since about January 1, 1885." The word-symbol, or device now claimed by complainants, as a trade-mark, is founded on the rule of the common law, that the person or company first employing it to distinguish the goods made or sold by the owner thereof, is entitled to the benefits arising from its exclusive use. The chancery courts of England and of this country have long recognized this privilege, and have enforced it, if the property right of the claimant thereto has been duly established.

As we see this case, the complainants are not entitled to the exclusive right to use the word "Pocahontas," as descriptive of either the locality or character of the coal mined in the "Pocahontas coal field," but all of the producers of that product in that section have the right to so use it in common with complainants. That word has acquired a generic meaning, and from the evidence before us it is clear that, in the business world, it is used to indicate the place where the coal is produced, and that it does

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not point to either the producer or the vendor of the same. All the mine owners who by their labor succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth; and surely it cannot be that any one of them can inhibit all the rest from exercising the privilege, which was the birth-right of the section, and is an advantage common to all who are interested in it. To give to complainants below the exclusive right they claim in their bill would be to ignore the principle that is the foundation of the protection given to trade-symbols and marks.

There remains yet one other allegation of complainants' bill to be considered, and that is the charge that the defendant below, intending to deceive dealers in coal and the public in general, unlawfully offered for sale, and sold, a very inferior article of coal under the name of "Pocahontas;" that purchasers of the same were liable to be and were misled, and were induced to buy it as the superior and selected grade usually sold by the complainants; and that thereby the public was deceived and the reputation of the coal sold by complainants was injured. It is undoubtedly true that complainants, as producers and sellers of coal from the "Pocahontas coal fields," are, with all other producers and mine operators in that region, interested in maintaining the purity and reputation of the natural product of the same, and that they may cause the defendant or any one else to be inhibited and restrained from selling, or offering to sell, an inferior coal from another region as the coal mined in the Pocahontas field. This they can do independent of the question of trade-mark, or of their right to the exclusive use of one.

This allegation that the defendant has been engaged in unfair and fraudulent trade is not supported by the evidence. It has been shown that he was advertising and selling "Pocahontas coal," but the testimony also shows that the coal he so advertised and sold was in fact from the "Pocahontas coal field." It follows that the representations made by him were neither fraudulent nor untrue, and that he had a lawful right to so advertise and sell. It nowhere appears that he ever represented to the public that he was selling the same article sold by complainants, except as their coal was comprehended by the word Pocahontas, which also justly described his own. He sold the product of the Browning mine, which is located adjoining the original mine of the Southwest Virginia Improvement Company, in the town of Pocahontas, the coal from which is now disposed of by the complainants as "Pocahontas coal," and it is proven that both collieries excavate from the same vein. As to the right of the Browning mine, one of the oldest in the field, to sell its product as "Pocahontas coal"

there can be no doubt, and it would be unconscionable to deny it. He also sold from the Indian Ridge mine, which is located within the "Pocahontas coal field," and it is shown that the complainants are now selling the output of the Rolfe and Arlington mines as "Pocahontas coal," both of which adjoin the Indian Ridge mine. The complainants themselves formerly sold the coal from this mine as "Pocahontas coal," and it is really difficult to understand why it becomes another article in the hands of the defendant. It is also set forth in the bill that the coal from the Indian Ridge section does not grade as high as that from other portions of the field, and that it had not been carefully inspected by the defendant before it was sold. But the evidence does not sustain the claim, and it appears that the complainants themselves have endeavored to again secure the right to sell this coal as "Pocahontas coal," since it has been so sold by the defendant, and we cannot believe that they would have made this effort had the grade of the product been inferior, or its inspection careless.

The proof does not show that the appellant has practiced any deception upon the public, or that he has perpetrated any fraud upon the appellees. The appellant advertised and was selling coal obtained from the Browning and Indian Ridge mines, of the "Pocahontas Flat Top Region," and he did not represent it as purchased from the appellees, nor as mined by them. He has represented it as coal from the Pocahontas field, and it was in fact such coal. He has made no false representations, and he has invaded no right to which the appellees can properly assert a claim. There is error in the decree appealed from, and it is reversed, and this cause is remanded to the court below with instructions to dismiss the bill. Reversed.

I do certify that the foregoing is a true copy of the original Opinion filed and now remaining of record in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the United States Circuit Court of Appeals
(Seal.) for the Fourth Circuit, at Richmond, on this 5th day of May, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals.

Extract From Decree:

* * * Appeal from the Circuit Court of the United States for the District of West Virginia.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and this cause is remanded to the Circuit Court of the United States for the District of West Virginia, at Charleston, with instructions to dismiss the bill. * * *

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 231.

W. H. Coffman, Appellant, vs. Samuel Castner, Jr., Henry B. Curran, Appellees.	Appeal from the Circuit Court for the United States for the District of West Virginia.

PETITION FOR REHEARING.

Richard C. Dale, Henry E. Everding, Counsel for Appellees and Petitioners.

Goff, Circuit Judge:

The Court has duly considered this petition for a rehearing, and it is ordered that the mandate issue as heretofore directed. The opinion filed in this cause on the 3rd day of May, 1898, found error in the decree appealed from, not, as stated in the petition for a rehearing, solely because the complainants below had failed to prove material allegations of their bill of complaint, but also because the Court found that the word "Pocahontas" could not be exclusively appropriated by complainants as a "trade-mark," or "word-symbol," for the reason that it was and is a geographical word, in and to which all the people of the section of the country to which it refers have the common right of use in connection with their business in such locality. It follows, therefore, that further proofs relating to the same would be unavailing, and it was for this reason that the Court remanded the cause with instructions that the bill be dismissed. The ruling is adhered to. We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for rehearing. The prayer of the petition is refused.

May 19, 1898.

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DECREE DISMISSING BILL.

At a Circuit Court of the United States, for the District of West Virginia, continued and held at Charleston, in said District, on Saturday, the 4th day of June, A. D. 1898, the following order was made and entered of record, to-wit:

Samuel Castner, Jr., and Henry B. Curran, co-partners, trading under the firm name of Castner & Curran, Complainants,
vs.
W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.
} In Equity.

This cause having been heard upon appeal in the Circuit Court of Appeals of the United States, for the Fourth Circuit, and said court having issued its mandate filed in this court upon the 30th day of May, 1898, wherein this cause was remanded by that court to this, with instructions to dismiss the bill of complaint.

Now, therefore, in consideration of said mandate, it is hereby ordered, adjudged and decreed that the bill of complaint in this cause be, and the same hereby is, dismissed, with costs to the defendant to be taxed

UNITED STATES OF AMERICA. } ss.
DISTRICT OF WEST VIRGINIA. }

I, L. B. Dellicker, Clerk of the Circuit Court of the United States for the District of West Virginia, do hereby certify that the foregoing is a true copy of a decree entered in the chancery cause of Castner & Curran vs. Coffman, on the 4th day of June, 1898.

In testimony whereof I have hereunto set my hand and the seal of said Court, this 23rd day of June, A. D. 1898, (Seal.) and in the 122nd year of the Independence of the United States of America.

L. B. DELLICKER, Clerk.

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